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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
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Rulemaking to Amend Parts 1, 2, 21, and 25	)	CC Docket No. 92-297
Of the Commission's Rules to Redesignate	)	
the 27.5-29.5 GHz Frequency Band, to	)	
Reallocate the 29.5-30.0 GHz Frequency	)	
Band, to Establish Rules and Policies for	)	
Local Multipoint Distribution Service	)	
And for Fixed Satellite Services	)	

COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION

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January 21, 2000

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COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association ("NCTA"), by its attorneys, submits the following comments in response to the Commission's Notice of Proposed Rulemaking, FCC 99-379, in the above-captioned proceeding.

NCTA is the principal trade association of the cable television industry. Its members provide video programming, Internet access and telecommunications services throughout the United States.

Cable systems may be adversely affected if the Commission continues the prohibition against the use of the LMDS frequencies by cable television systems beyond the sunset deadline of June 30, 2000. NCTA believes that the Commission should permit the prohibition to expire on that date, after which all parties should be permitted to acquire available spectrum on an equal basis.

INTRODUCTION AND SUMMARY

In 1997, the Commission allocated 1,300 MHz of spectrum per basic trading area for LMDS. At the time it issued its decision, the Commission believed that the spectrum had unique attributes which would enable successful bidders to deploy facilities and to offer services that would compete effectively with incumbent providers of multichannel video programming distributors ("MVPD") services and telephone services. It emphasized that the restriction would be applied for a limited duration after which it would sunset unless it was determined "that maintaining the restriction would further promote competition in the MVPD market."[1]

The Commission found that despite the prospect of increased competition to cable systems from DBS, MMDS, SMATV services and other sources, "... these various competitive prospects, taken together, do not mean that an incumbent ... cable TV firm will be unable to preserve substantial market power or delay significantly the development of competition by acquiring in-region LMDS licenses."[2] The Commission further concluded that "... absent short-term eligibility restrictions, incumbents would be able to delay the onset of competition from LMDS by acquiring LMDS licenses congruent to their present service territories."[3] Based upon these findings, the Commission imposed a short-term, three-year prohibition against bidding by cable companies for LMDS spectrum.

The prohibition is now about to expire by its own terms. Over the objections of Commissioners Furchtgott-Roth and Powell who make compelling cases for allowing the

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1 Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate The 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, at 12616 (1997) (Second Report and Order).

2 Id. at 12618.

3 Id.

prohibition to end without further proceedings, the Commission seeks comment on whether the prohibition should be extended or terminated. By issuing this Notice, the Commission is, in effect, reopening the question of whether the prohibition should be extended. In the process, it is inviting cable's competitors to conjure up new grounds for a market entry restriction as well as new scenarios of what might or might not happen several years down the road if cable companies are permitted to compete on an unrestricted competitive basis.

At this point, two things are clear. First, the goal of multichannel video competition has been realized. Virtually every consumer may choose between cable and two DBS options, and may have other alternatives. And, as the decline in cable's multichannel video market share demonstrates, consumers are doing just that.

Second, the Commission's decision to restrict cable from bidding for LMDS frequencies, three years after the fact, has contributed nothing to this increased competition. Despite the glowing predictions that LMDS would provide "a rare opportunity"[4] for effective competition to cable, cable's potential competitors have not shared this assessment.

The experience of the last three years counsels in favor of eliminating the restriction. The Commission should adopt the proposal put forward by Commissioner Powell in his Dissenting Statement to apply the standard adopted in the 39 GHz Proceeding to LMDS. Under this standard, cable companies should be allowed to participate in the LMDS bands unless their participation will result in a "significant likelihood of substantial competitive harm in specific markets" and this restriction is "an effective way to address that harm." Based upon the experience of the past three years, the Commission can confidently conclude that lifting the restriction will not result in a significant likelihood of competitive harm.

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[4] Id. at 12619.

I. THE SUNSET SHOULD NOT BE EXTENDED WITH RESPECT TO CABLE OPERATIONS UNLESS THERE IS A "SIGNIFICANT LIKELIHOOD OF SUBSTANTIAL COMPETITIVE HARM" AND THIS ELIGIBILITY RESTRICTION IS "AN EFFECTIVE WAY TO ADDRESS THAT HARM"

As the Commission recognizes, before it can properly assess the reasonableness of maintaining or lifting the existing constraint on cable company access to LMDS spectrum, it must first reevaluate the standard by which it determines whether the application of a market-limiting condition is still appropriate. The standard is critical because it provides the basis for assessing the reasonableness of continuing a restriction. Reevaluation of the restriction is necessary, moreover, because the Commission stated repeatedly when it adopted the prohibition in 1997 that the restriction was a short-term remedy for perceived anticompetitive practices that could arise if it were not put in place.

With the passage of time it has become clear that the Commission's hopes, and fears, for LMDS are not going to develop. Cable companies are subject to increasing competition from alternative providers of MVPD services. This increased competition has occurred despite the absence of LMDS as a competitive factor in the MVPD marketplace.

In deciding its further approach to LMDS eligibility, the Commission asks whether "substantial market power" remains the appropriate standard for evaluating whether the restriction should be extended, or "whether a different standard is more appropriate."[5] The Commission also puts forward several alternatives to "substantial market power" as potentially appropriate standards. It inquires whether the sunset might be extended on the grounds that a cable operator possesses the incentive and ability to engage in a "warehousing" strategy by

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5 Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Sixth Notice of Proposed Rulemaking, FCC 99-379, rel. Dec. 1, 1999, at para. 40 ("Sixth Notice").

purchasing "... the LMDS block to prevent the entry of a competitor."[6] In the alternative, the Commission asks whether it should apply the test adopted in the 39 GHz Report and Order,[7] which "inquired whether open eligibility poses a significant likelihood of substantial competitive harm in specific markets, and, if so, whether eligibility restrictions are an effective way to address that harm."[8] Parties are also asked whether case-by-case review of license transfers and assignments should be undertaken if the eligibility restriction is allowed to sunset.[9] Finally, the Commission inquires whether the prospect that LMDS spectrum may be used to deliver broadband Internet access provides justification for excluding cable companies from seeking these facilities.[10]

A. "Significant Likelihood of Substantial Competitive Harm" is the Appropriate Measure of Whether Cable Companies Should Be Restricted From Acquiring LMDS Spectrum

Commissioner Powell's Dissenting Statement cogently sets forth the circumstanc es in which temporary entry restrictions are appropriate. The Statement explains:

> Speculating, to some degree, about potential anticompetitive effects when dealing with competitive policy is unavoidable. On the other hand, undue speculation about potential harm can always be invoked to justify continued regulation and its accompanying (and unavoidable) influence on market development.... Sunsets have value in that they place a cap on such speculation and introduce certainly into the market. Yet, all value is lost when the cap is routinely reexamined and extended, not based on new

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6 Id. at para. 41.

7 Amendment of the Commission's Rules Regarding 37.0-38.6 GHz and 38.6-40.0 GHz Bands, Report and Order and Second Notice of Proposed Rulemaking, 12 FCC Rcd 18600 (1997) (39 GHz Proceeding).

8 Id. With specific respect to this second test, the Commission asks whether it should require that the test be met before extending the restriction.

9 Id.

10 Id. at para. 42.

evidence that the predicted harm has been realized (as feared), but on a new set of speculative fears.[11]

It is this analysis that the Commission should employ in its consideration of whether to terminate or to extend the cable entry prohibition.

Application of this analysis to the instant proceeding leads inevitably to the conclusion that the Commission should apply the standard adopted in the 39 GHZ Proceeding to LMDS. Under that standard, the sunset would not be extended unless the Commission concludes that "... open eligibility poses a significant likelihood of substantial competitive harm in specific markets, and, if so, whether eligibility restrictions are an effective way to address that harm."[12] The Commission should apply this standard, rather than "substantial competitive harm" or any of the new alternatives proposed in the Notice.

B. The "Substantial Market Power" Test is Not the Appropriate Basis for Assessing the LMDS Restriction Imposed on Cable Companies

The existing standard--substantial market power—is not the appropriate standard. As Commissioner Powell observes, while speculation about anticipated competitive effects is unavoidable, a time cap must be applied to the duration during which the ownership prohibition will remain in force.[13] The speculative fears have not been realized, and the only basis for extending the bar is to posit a new set of speculative fears arising from alleged substantial market power that have even less likelihood of being realized as the last set.

While no LMDS frequencies are being used to deliver cable services, cable companies are facing substantial competition from DBS and other sources. Commissioner Powell notes,

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11 Dissenting Statement of Commissioner Powell, FCC 99-379, rel. Dec. 13, 1999, at 7. ("Statement of Commissioner Powell").

12 39 GHz Proceeding 12 FCC Rcd at 18619.

13 Statement of Commissioner Michael Powell at 7.

"... the Commission is coming to the view that the anticipated uses of LMDS spectrum that originally formed the basis of the restriction has been eroded by market (and technological) developments."[14] The Commission should not extend the effectiveness of the LMDS entry prohibition on the basis of a new set of "speculative fears", as Commissioner Powell notes, regarding cable's market power when that market power is decreasing so dramatically.

C. The Warehousing Test Advanced in the Notice Should Not Be Adopted

The Commission should reject extension of the prohibition based on the particular "new fear" advanced in the Notice that cable companies will engage in a "warehousing" strategy. The Commission asks whether it should extend the prohibition based upon a finding that incumbent cable companies "... possess the incentive and ability to purchase the LMDS block to prevent the entry of a competitor."[15] In other words, the Commission is inquiring whether a cable company, if permitted to acquire LMDS frequencies, will respond by purchasing the frequencies but not put these frequencies to their most efficient use.

There is no basis to reasonably conclude that a cable company will engage in warehousing LMDS frequencies. Cable companies throughout the United States are in the process of upgrading their plant to deploy digital video services, broadband Internet access and other advanced services. These services are being offered because consumers are telling cable operators that this is what they want. Digital video services offer the prospect of relieving the channel congestion that has limited cable's program offerings since the inception of television. Broadband Internet access is a highly successful service that enables consumers to receive Internet communications 50 to 100 times faster than conventional telephone lines. With these

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14 Id. at 6.

15 Sixth Notice at para. 41.

increased speeds, consumers are able to receive much more sophisticated data and graphics with substantially increased efficiency. This means the home computer is becoming an increasingly vital component in the everyday process of informing and entertaining the American people. In the future, television sets will play this role to an increasing extent. Digital circuit-switched telephone service is provided in some areas by cable systems. And, advanced services such as Internet telephony by cable will soon be available on a general commercial basis.

Over the past few years, cable companies have been engaged in enormous efforts to upgrade their systems to make them capable of delivering these services to consumers. This effort has required massive capital, technical and operational resources.[16] In the midst of this effort—which involves nothing less that the broadband rewiring of America—the cable industry is not going divert significant resources to a major non-performing asset. Cable companies will invest in LMDS only if these frequencies can be deployed as part of their overall strategies to deliver communications services to the public. It would be most foolish for a cable company to divert scarce resources to a nonperforming asset, and thereby give the financial markets reason to doubt the seriousness with which it takes its various endeavors.[17]

D. Case-by-Case Analysis of License Transfers is Appropriate, So Long As the "No Significant Likelihood of Harm to Competition in Specific Markets" Test is Applied and a Deadline is Imposed on Commission Decision-Making

The Commission also seeks comment " ... on the sufficiency of case-by-case review of license transfers and assignments to safeguard against anticompetitive acquisition of LMDS

[16] Since the 1996 Act, cable companies have invested over $31 billion plant and equipment. Paul Kagan Associates, the Cable TV Financial Data Book, 1999, at 149.

[17] And even if a cable company attempted this strategy, DBS take rates indicate it would not be successful. There is no use in "warehousing" one platform where multiple platforms already exist.

licenses if the eligibility rule is allowed to sunset."[18] The transfer and assignment procedure is crucial to the efficient functioning of the marketplace.

The entry restrictions adopted in 1997 have placed a premium on an efficient transfer and assignment process. As a result of the entry restrictions, it is very likely that the spectrum, purchased through the auction process, is not held by the users who have the greatest need for the frequencies. (It is also likely, by excluding telcos and cable, that the auction revenues for LMDS spectrum are significantly less than would have been the case if the restriction were not in place.) The Commission should rectify this error now by permitting all interested marketplace participants to take part in the transfer and assignment process.

Case-by-case review of transfers and assignments should be adopted in conjunction with the no "significant likelihood of substantial competitive harm in specific markets" test. It should be an efficient, time-limited process that enhances the likelihood that the LMDS spectrum will be utilized to deliver needed services to consumers.

As part of this process, the Commission should commit to resolving requests for assignments within a six-month period. Six months is a reasonable period of time for interested parties to comment, and for the Commission to review the record and to resolve outstanding issues. Without the implementation of a reasonable deadline, parties interested in purchasing licenses will be at a severe competitive disadvantage because while they await Commission action, their competitors may be able to offer service to customers. By ensuring that the transfer and assignment process will be completed by some date certain, the Commission will enhance the value of the LMDS band and increase the likelihood that its goals for the LMDS band are realized.

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18 Sixth Report at para. 41.

E. The Potential Use of LMDS Spectrum to Deliver Broadband Internet Access Provides No Basis for Excluding Cable Companies from Competing for These Frequencies

The Commission also seeks comment on what broadband applications are likely to be provided over LMDS frequencies and the characteristics of the customers that are likely to be targeted. The Notice states that after considering the comments in this regard, the Commission intends "... to evaluate whether we should extend the eligibility restriction to avert the possibility of ... cable companies acquiring LMDS to forestall new facilities-based competition for broadband services."[19]

The Commission is suggesting by this proposal that even if the MVPD market is competitive, and even if there are no grounds in its evaluation of the MVPD marketplace to exclude cable companies, it may still find a basis for keeping cable out of LMDS. This could happen, the Commission suggests, if the agency concludes that cable's participation in LMDS may have an adverse impact upon the nascent broadband services market.

If past policy is a guide, the Commission should not go down this road. The agency has a long history of imposing ownership restrictions on an industry because of its perceived dominance in one market and the anticipated impact of its participation in a second market. While these types of rules were common in the middle and latter part of the last century, they have met with increasing disfavor. The elimination of the regulations relating to financial ownership and syndicated of television programming[20] and cable television/telephone company cross-ownership[21] are two prime examples of regulatory structures that have been eliminated in favor of competition.

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19 Id. at para. 43 (citation omitted).

20 Financial Interest and Syndication Rules, 72 R.R. 2d 1044, recons. 73 R.R. 2d 1452 (1993).

21 Telecommunications Act of 1996, § 302 (b) (1) (repealing 47 U.S.C. 533 (b)).

There is also a third example—quite instructive in this context—where the Commission considered an entry prohibition but chose a different course. In 1979, the Commission issued its Notice of Proposed Rulemaking in CC Docket No. 79-318, which proposed to establish rules for the new cellular communications service.[22] At the time, the Commission expected that cellular service would be used exclusively as a common carrier mobile radio service; i. e., by persons in the course of motor vehicle transport.

The Commission did inquire, in addition, about the implications of the cellular service for conventional telephone service. It asked for comment whether wireline telephone companies should be excluded from offering cellular service because cellular could become a competitor to telephone service. The Commission was particularly concerned that if they were permitted to offer the cellular service, wireline telephone companies would market the cellular service as a mobile service (to the exclusion of stationery services) as a way of protecting their basic services from common carrier mobile service competition.[23]

In its 1981 Report and Order,[24] the Commission did not prohibit wireline telephone companies from offering cellular service. In fact, it did just the opposite. Finding that wireline telephone companies possessed unique abilities to take advantage of the cellular technology and to promptly offer common carrier mobile services to consumers, the Commission took the unusual step of designating a block of frequencies for the exclusive use of wireline carriers.[25]

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22 Cellular Communications Systems, 78 F.C.C. 2d. 984 (1980).

23 Id. 78 F.C.C. 2d at 193-195.

24 Cellular Communications Systems, 86 F.C.C. 2d. 469 (1981) (Report and Order)

25 Id., 86 F.C.C. 2d. at 487-493.

The Commission's decision not to exclude wireline carriers from the cellular bands contributed to advancements in cellular technology and the development of a robust competitive market. The Commission's PCS entry policies have accelerated this process.

More recently the FCC has eschewed restrictions on who may apply for spectrum that may have new uses. In the 39 GHZ proceeding,[26] and recently in the proceeding reallocating channels 60-69 of the UHF television band,[27] the Commission allocated spectrum that was capable of delivering additional communications services. In contrast to the LMDS ruling, however, it did not impose entry restrictions on bidders for the new frequencies based upon businesses in which they currently operate.

The Commission might attempt to distinguish the imposition of an entry restriction for LMDS frequencies from these other allocations. It might be argued, for example, that by excluding cable companies from LMDS, the Commission preserves a large, video-capable band for cables' competitors. With the LMDS frequencies reserved for cable's competitors, the remaining bands may be fully opened to competition, including competition from cable companies.

But the wiser course is for the Commission to acknowledge that MVPD competition is flourishing, and that this is occurring despite the absence of any use of LMDS allocations to provide video services in competition with cable systems. The *temporary* exclusion of cable companies from LMDS has failed to contribute toward the enhancement of competitive forces in the video marketplace. And there are no grounds to expect that excluding cable systems from

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[26] 39 GHz Proceeding, 12 FCC Rcd at 12617-12620.

[27] Service Rules for the 746-764 and 776-794 MHz Bands and Revisions to Part 27 of the Commission's Rules, FCC 00-5, rel. Jan. 10, 2000.

LMDS for an additional period of time, whether premised on old competitive scenarios or new ones, will change this result.

The Commission should adopt the open market approach, rather than take the truly draconian step of extending the prohibition based upon conditions in the nascent Internet access business. At a time when the Commission appears to be moving away from the imposition of market entry restrictions, it would be an entirely new type of restriction which, if imposed in other contexts, will significantly expand the agency's role in policing competitive entry into new businesses.

The benefits of cable companies as a bidder or purchaser of LMDS frequencies—even when the prospect of using LMDS for broadband Internet access is factored in—far outweigh the risks.

II. THERE IS NO CREDIBLE POSSIBILITY THAT PERMITTING CABLE COMPANIES TO COMPETE FOR LMDS FREQUENCIES WILL RESULT IN SUBSTANTIAL COMPETITIVE HARM

Whatever the standard for cable's eligibility to offer LMDS—and we urge the "substantial competitive harm in specific markets" test—the test should be informed by data on the competitiveness of the MVPD marketplace and the potential of LMDS to increase the competitiveness of that marketplace. As we now show, (i) the MVPD marketplace is competitive, (ii) there are no grounds for restricting cable's participation in the service under the "substantial competitive harm" standard, and (iii) LMDS is not uniquely positioned to become the "third pipe" into American homes.

A. Substantial Competitive Harm Will Not Result If Cable Companies Are Permitted to Compete for LMDS Frequencies

The Commission barred cable companies from participation in LMDS for a three-year period in 1997 after reaching the conclusion that they possess "substantial market power". Three years later, it is abundantly clear that whatever the legitimacy of the Commission's original judgment, there is no longer any basis for continuing to exclude cable companies from access to LMDS frequencies.

1. The available data demonstrate that the MVPD marketplace is increasingly competitive

The competitive conditions in the multichannel video marketplace have changed significantly since the Commission imposed the prohibition in 1997. There are various ways of measuring these changed competitive circumstances. By any measure, however, the new circumstances are market-transforming.

The state of video competition is marked by an ever-widening array of players, and the availability of these players translates into increasing choices for consumers. Even more important, perhaps, is that consumers are acting upon these choices by selecting the available multichannel video alternatives. NCTA reported to the Commission last August that "... seven out of ten new MVPD customers are choosing DBS or another MVPD over cable."[28] This trend is continuing.

The tendency of subscribers in the past several years to select multichannel alternatives to cable service is translating into phenomenal growth in the actual numbers of subscribers served by cable's competitors. In April 1997, the first reporting period following the release of the Second Report and Order in this proceeding, there were 2.995 million DBS subscribers. As of January 1, 2000, less than three years later, there are 11.40 million DBS subscribers.[29]

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28 Comments of the National Cable Television Association, CS Docket No. 99-230, Aug. 6, 1999, at 4.

29 "DISH Network Offers Local Channels to Houston, Kansas City Via Satellite Television," www. Dishnetwork.com/profile/press/press/press276.htm, Jan. 19, 2000; "DIRECTV Ends Record-Breaking Year With More than 8 Million Customers," www.directv.com/press/pressdel/ 0,11112,285,00.html, Jan. 6, 2000.

This data do not merely show the popularity of DBS or that the number of DBS subscribers has more than tripled in less than three years. While the increasing demand for DBS is significant in itself, it pales in comparison to the importance of changes in consumer perception. It is beyond doubt that consumers view DBS as a genuine competitive alternative to cable service. Subscribers considering the selection of an MVPD provider for the first time commonly engage in a decision process in which they balance the relative merits of cable and DBS. Subscribers also commonly consider whether to switch multichannel providers based upon service and pricing options.

Competition between cable and DBS will grow more intense as subscribers become aware of the capability of the satellite services to deliver local broadcast signals. While the ability of cable companies to provide local broadcast signals has been perceived to afford them a competitive advantage, to the extent that advantage exists SHVIA will remove it. As consumers become increasing aware of this development, even more are likely to choose the DBS option.

DBS is just one of cable's multichannel video competitors. The most recent available data demonstrate that there are approximately 1.65 million C-Band subscribers,[30] nearly one million MMDS customers, approximately 1.40 million SMATV customers, and .40 million subscribers who receive video service from their local telephone company.[31] In total, more than 18 per cent of multichannel subscribers, or nearly one in five, take multichannel service from a provider other than the franchised incumbent cable operator.

The number of subscribers with choices among multichannel video services providers is as or more significant to any assessment of the state of competition. If consumers have choices,

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30 SkyReport, www.skyreport.com/skyreport/dth_us.htm, Dec. 1998-Dec. 1999.

31 Paul Kagan Associates, Cable Program Investor, Jul. 14, 1999, at 4.

MVPDs will be forced to compete among themselves for their allegiance. Unfortunately, hard data do not exist concerning the number of consumers with multichannel video service choices. It is clear, however, that as a general proposition the vast majority of subscribers have at least one choice.

Subscribers residing in multi-unit dwellings in urban and suburban areas have access to SMATV service, MMDS service or DBS service, as well as cable service. Subscribers who reside in single unit dwellings in urban and suburban areas generally can receive two competing DBS services as well as cable service. And those residing in rural areas generally have access to C-band and DBS service, even if they are unable to obtain cable service.

2. The presence of competitive alternatives severely constrains the market power of incumbents

The offering of genuine multichannel choices to consumers effectively constrains cable's market power in video services.

These changed circumstances are demonstrated in a report prepared by Economists Inc. ("EI"), which was appended to NCTA's Video Competition comments. In "FCC Video Competition Proceeding: Use and Limitations of Structural Indicia of Market Power,"[32] EI pointed out:

> First, there is virtually no limit to the capacity of DBS providers to expand the number of customers they serve. Indeed, DBS providers can expand output almost instantaneously because they already have invested in 100 percent national coverage. Second, even at expanded service levels, the marginal cost of serving another DBS customer is zero. The marginal cost of providing the required earth-based equipment is small and falling.... For these reasons, the supply elasticity of DBS providers is likely sufficient to constrain any attempt to increase cable rates or otherwise exercise market power.[33]

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[32] "Use and Limitations of Structural Indicia of Market Power," appended to "Comments of the National Cable Television Association, CS Docket No. 99-230, Aug. 6, 1999.

[33] Id. at 10.

In light of these changed circumstances, it can no longer be argued that cable companies exercise market power in video distribution.

EI goes on to explain that "special circumstances may permit the large firm to exercise market power despite the presence of smaller competitors capable of rapid expansion at low cost,"[34] but these circumstances do not apply to an analysis of video competition. According to EI:

> [I]f the large firm's product is significantly superior to the product offered by the smaller firms, some customers may remain with the large firm even after it raises its price. In the case of multichannel video, product differentiation is based chiefly on the number of channels offered, picture quality, and the availability of local broadcast signals.[35]

EI finds that with respect to two of these factors—number of channels and picture quality—the DBS service typically has a comparative advantage over the cable offering. While cable may have enjoyed a marginal advantage from the third factor, local broadcast signals, this advantage will diminish as DBS begins to offer local broadcast transmissions. EI observes that "... there is no reason to conclude that consumers would not readily abandon cable for DBS if cable operators were to attempt to exercise any market power." [36]

EI further explains that, in theory, a firm will be able to exercise market power by selectively raising rates only to those customers least likely to choose competitive alternatives. As the study explains, however, cable operators cannot engage in this strategy. They do not have the ability to selectively identify customers lacking multichannel video choices. And, even if

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[34] Id.

[35] Id. at 10-11.

[36] Id. at 11.

they did, the strategy could not be implemented because the 1992 Cable Act requires cable operators to apply uniform geographic rate structures throughout their service areas.[37]

The consistent decline in cable's share of the MVPD market is one indication that it is far less dominant. But other factors are even more telling. DBS is generally available throughout the United States. There are virtually no limits to the number of customers they can serve. And, the cost to DBS providers to serve additional customers is zero. Moreover, cable operators are not able to engage in product differentiation and price discrimination strategies in response to the DBS service. In these circumstances, the Commission should find that cable companies do not exercise market power in the provision of video services, and certainly not substantial market power.

B. LMDS is Not the "Third Pipe" Into American Homes, But Video Competition is Flourishing

It is probable that the Commission did not foresee the profound competitive consequences of DBS for the multichannel video marketplace when it issued the Second Report and Order in this proceeding. It invested great hope in LMDS, expecting that the service would enable the agency to realize its goal of effective, facilities-based multichannel video competition. The Second Report and Order missed the mark when it predicted with respect to video service that "By restricting in-region LEC and cable companies, ... [it would] ... ensure the entry of a new LMDS operator that could provide competition in the LEC market, the MVPD market, or both."[38]

Nearly three years later, it is clear the goal of multichannel video competition is being achieved by DBS and other MVPDs. It is equally obvious that, for the foreseeable future,

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[37] See 47 U.S.C. § 543 (d).

[38] Second Report and Order, 12 FCC Rcd at 12617.

LMDS will be a secondary competitive factor, if that, in the MVPD marketplace. It follows that there is no credible basis for excluding cable companies from that marketplace.

In 1997, the Commission justified the *temporary* prohibition against the cable industry's use of LMDS spectrum on the grounds that LMDS offered a special competitive opportunity. The Second Report and Order anticipated that the magnitude of the 1150 MHz assignment in the LMDS service would be particularly well suited for multichannel video service. The Commission was concerned that it would lose an irreplaceable opportunity to foster multichannel video competition if it failed to impose the entry restriction.

Despite the entry restriction, LMDS has not developed as a multichannel video medium. Indeed, so far as we are aware, no customer is receiving MVPD service through LMDS frequencies, and this situation is not about to change.

C. The MVPD Marketplace Satisfies the Commission's Standard of Competitiveness Set Forth in the Second Report and Order

Even though LMDS has not developed as a multichannel video competitor, the evolution of DBS and other multichannel services has been sufficiently robust to create conditions that satisfy the Commission's standards laid out three years ago in the Second Report and Order. While these standards were intended to apply to petitions for waiver of the restriction in individual markets, developments make clear that competitive conditions apply generally throughout the United States.

In the Second Report and Order, the Commission set forth five factors to be considered in the evaluation of whether a market is "sufficiently competitive" to warrant the removal of the prohibition in a particular market. The first factor is "the number and capacity of competing providers of ... multichannel video services, especially those with independent means of distribution, that are available to a significant number of consumers in the geographic region at issue."[39] The presence of facilities-based providers is critical to a positive evaluation of actual competition. Two nation-wide providers of DBS services, as well as providers of MMDS, SMATV services and telephone company video services to selected areas, taken in combination, offer an effective alternative means of distributing video programming throughout the United States.

The second factor relates to "the substitutability of the services of those competing providers with the ... multichannel video services offered by the ... cable firm."[40] As EI demonstrates, the video service offered by DBS is substitutable with cable service in that there is no significant differentiation between the products offered by these service providers. DBS generally provides a comparable number of channels and comparable picture quality. To the extent the former lack of broadcast segments placed DBS as a competitive disadvantage, SHVIA will eliminate this disadvantage.[41]

The third factor concerns "evidence as to whether the ... cable company could or would lose a significant portion of its subscribers to its competitors if it unilaterally increased its prices or lowered the quality of its services."[42] Cable companies' MVPD market share has dropped significantly over the past three years as subscribers have increasingly chosen the DBS option over cable service. Faced with these competitive conditions, it is likely that a cable system's market share would drop even more precipitously if it were to raise its price or reduce its service quality.

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39 Id., 12 FCC Rcd at 12633.

40 Id.

41 Id.

42 Id., 12 FCC Rcd at 12634.

The fourth factor is "the regulatory environment for competing providers in the relevant geographic region."[43] As noted previously, with DBS's nationwide footprint, the relevant geographic region is the United States. Congress and the Commission have moved aggressively to facilitate video competition throughout the country by removing regulatory barriers. It is difficult to imagine how DBS could enjoy a more congenial regulatory environment.

The final factor is "whether the ... cable company has in fact experienced a significant loss in market share due to the entry of new competitors or the expansion of existing competitors."[44] DBS market share has more than tripled in the past three years, and the trend appears to be continuing. This final factor is plainly satisfied on a national basis.

By satisfying each of these competitive factors, cable operators would qualify for a de facto national waiver of the LMDS bar under the "substantial market power" test of the Second Report and Order. With the *temporary* LMDS bar about to expire, there is, of course, no reason to consider the waiver route.

The issue is whether to extend the bar. The ability of cable companies to so easily jump across the old bar strongly suggests they should also be allowed pass any new bar the Commission erects.

CONCLUSION

Applying the "substantial market power" test three years ago, the Commission concluded that the goal of MVPD competition would be furthered by temporarily excluding co-located cable systems from competing for the available frequency assignments. Three years later, it is

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43 Id.

44 Id. (citation omitted)

clear that excluding cable companies from the LMDS application process has done nothing to advance competition in the MVPD marketplace.

Moreover, there is no indication that competition will be advanced if the Commission extends the prohibition based on any of the grounds put forward in the Notice. With respect to the MVPD market, despite three years of the cable entry prohibition, there is virtually no interest on the part of MVPD competitors in offering service on the LMDS bands. In fact, while one entity, Cellularvision, was very active in promoting the use of the larger band at the time of the Commission's 1997 ruling, it has since sold its frequencies to a non-MVPD user and left the field.[45]

The broadband Internet access market is not concentrated and, even if it were, LMDS frequencies do not possess properties that make these bands uniquely suited to provide this service. Cable operators, local telephone companies, CLECs and others are offering broadband Internet access in response to tremendous consumer demand. This is occurring without LMDS as a significant player.

The Commission found in its most recent Section 706 Report that the nascent broadband Internet access market is competitive and there is no basis for government intervention to spur competition in this market.[46] Eventually, LMDS may turn out to be one of the ways of delivering broadband Internet access. But there are no grounds for anticipating that without an ownership restriction cable companies will purchase LMDS frequencies to dominate broadband Internet access.

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45 "Winstar to Acquire 850 MHz of Bandwidth in New York City from Cellularvision USA," Winstar Telecommunications – 1998 Press Releases, www.winstar.com/press/1998/0713981.asp

46 Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, FCC 99-5, rel. Feb. 2, 1999, at para. 101.

It is time for the Commission to cease applying the "substantial market power" test to the issue of cable's participation in LMDS and other markets because cable companies do not exercise substantial market power in video services. But even if the Commission was to doubt the competitive condition of cable's market, it should no longer apply the substantial market power test. Marketplace circumstances are such that the correct question is "whether there is convincing evidence that there is a significant likelihood of substantial competitive harm in specific markets, and, if so, whether eligibility restrictions are an effective way to address that harm." The record demonstrates that there is no likelihood of harm potentially arising from the lifting of the LMDS restriction and it should be permitted to sunset.

Respectfully submitted,

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January 21, 2000